Supreme Court of the United States

October Term, 1964

No. 256

BILLIE SOL ESTES,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

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The American Bar Association files this brief as *amicus curiae* pursuant to the written consent of the parties submitted herewith.

Opinions Below

The opinions of the court below have not been reported. Relevant portions of the opinion of the Court of Criminal Appeals of Texas affirming petitioner's conviction, dated January 15, 1964, appear at R. 135-37. The full text, including the concurring opinion, is printed at pp. 1a-35a of the Petition for a Writ of Certiorari. The court's opinion of March 11, 1964 overruling petitioner's motion for rehearing is printed in part at R. 143 and in full at pp. 36a-42a of the Petition. Petitioner's second motion for rehearing was overruled April 15, 1964, without written

opinion (R. 144), but the court entered an order correcting a misstatement of the record in its prior opinion on rehearing (p. 43a of the Petition).

Jurisdiction

The judgment of the Court of Criminal Appeals of Texas was entered January 15, 1964 (R. 138). Petitioner's second motion for rehearing was overruled April 15, 1964 (R. 144). Petition for a Writ of Certiorari was filed on July 7, 1964 and granted on December 7, 1964 on a limited issue (R. 145). The jurisdiction of this Court was invoked under 28 U.S.C. § 1257(3).

Statutes Involved

There are no statutes or regulations directly involved. Petitioner's claim is based on an infringement of his rights under the Fourteenth Amendment to the Constitution which provides in pertinent part:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Question Presented

This brief will discuss the following question to which certiorari has been limited:

Does the introduction of television into a State criminal trial, contrary to the principles of Canon 35 of the Canons of Judicial Ethics of the American Bar Association, over the objection of the defendant, violate the due process and equal protection clauses of the Fourteenth Amendment?

Interest of *Amicus Curiae*

The fundamental Constitutional issues which are to be reviewed in this case are of vital concern to the American Bar Association and its nearly 120,000 members. As a

national professional association of lawyers dedicated "to advance the science of jurisprudence" and "to apply its knowledge and experience in the field of the law to the promotion of the public good," the Association is interested in presenting to the Court its views on the nature of a criminal defendant's right to a fair trial and the impact of television thereon. The Association particularly wishes to set forth its reasons for respectfully urging the Court to reverse petitioner's conviction inasmuch as it believes that the Constitutional infirmity involved is reflected in the proscription of Canon 35 of its Canons of Judicial Ethics. Although the Canon does not have the force of law *proprio vigore*, the fact that nearly all of the States and the Judicial Conference of the United States have adopted it in one form or another indicates that the great majority of those responsible for the administration of justice have concluded that the right of fair trial is best preserved by the exclusion of television from the courtroom.

In filing this brief, the Association is not concerned with the question of the guilt or innocence of the petitioner nor with his record. The fact that he was a noforious person, subject to many criminal proceedings, makes him no less entitled to absolute fairness at his trial. The difficulty of assuring a fair trial to notorious or unpopular defendants is so great that they particularly need sturdy application of Constitutional protections.

The history of Judicial Canon 35 illustrates the development of the Association's position that th Canon embodies the Constitutional principles here involved. It was originally adopted on September 30, 1937 by the House of Delegates* in the following form:

> "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photo-

* The House of Delegates is not only the governing body of the American Bar Association; because of the presence of representatives of all State Bar Associations, the largest and most important local bar associations, and of other important national professional groups, it is in fact a broadly representative policy forum for the profession as a whole.

graphs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted." 62 A. B. A. REP. 1134-35 (1937).

A Special Committee on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings had reported to the Association its grave concern with the dangers attendant upon the use of radio in connection with trials, particularly in light of the spectacular publicity and broadcast of the trial of Bruno Hauptmann.* The Committee specifically referred to the evil of "trial in the air".** 62 A. B. A. REP. 860 (1937).

After the adoption of Judicial Canon 35, the direct radio broadcasting of court proceedings was disapproved by the Association's Committee on Professional Ethics and Grievances in its Opinion No. 212, March 15, 1941, as being specifically condemned. The Committee quoted with approval the following statement of the Michigan and Detroit Bar Associations:

> "Such broadcasts are unfair to the defendant and to the witnesses. The natural embarrassment and

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* See *State* v. *Hauptmann*, 115 N.J.L. 412, 180 Atl. 809 (Ct. Err. & App.), *cert. denied*, 296 U.S. 649 (1935).

** Prior to the adoption of Judicial Canon 35, the impropriety of permitting radio broadcasts of court proceedings was recognized by the Committee on Professional Ethics and Grievances of the Association in its Opinion No. 67, March 21, 1932. The Committee had recourse to Judicial Canon 34 which provides that a judge should not administer his office "for the purpose of advancing his personal ambitions or increasing his popularity." The Committee found that radio broadcasting of a trial changes "what should be the most serious of human institutions either into an enterprise for the entertainment of the public or of one for promoting publicity for the judge." AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 163 (1957).

> confusion of a citizen on trial should not be increased by a realization that his voice and his difficulties are being used as entertainment for a vast radio audience. The fear expressed by most persons when facing an audience or microphone is a matter of common knowledge, and but few defendants or witnesses can properly concentrate on facts and testify fully and fairly when so handicapped.... Such broadcasts are unfair to the Judge, who should be permitted to devote his undivided attention to the case, unmindful of the effect which his comments or decision may have upon the radio audience." AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 426 (1957).

In 1952, the growing prominence of television as a medium of mass communication was dealt with in a report of the Special Committee on Televising and Broadcasting Legislative and Judicial Proceedings. 77 A. B. A. REP. 607 (1952). In condemning the practice of televising judicial proceedings, the Commiftee called attention to the fact that:

> "The attention of the court, the jury, lawyers and witnesses should be concentrated upon the trial itself and ought not to be divided with the television or broadcast audience who for the most part have merely the interest of curiosity in the proceedings. It is not difficult to conceive that all participants may become over-concerned with the impression their actions, rulings or testimony will make on the absent multitude." *Id.* at 610.

As a result of this report, and the recommendation of the Committee on Professional Ethics and Grievances, Judicial Canon 35 was amended by inserting a ban on the "televising" of court proceedings and inserting the descriptive phrase "distract the witness in giving his testimony" before the phrase "degrade the court". In addition, a second paragraph was added providing for the televising and broadcasting of certain ceremonial proceedings. *Id.* at 110-11.

In October, 1954, the Board of Governors authorized the appointment of a Special Bar-Media Conference Committee on Fair Trial-Free Press to meet with representatives of the press, radio, and television. The views of both sides were thoroughly explored and were presented in detail in the September, 1956 issue of the American Bar Association Journal.* After extensive joint debate, no solutions or agreements were reached. 83 A. B. A. Rep. 790-91 (1958). The Committee did report that it was convinced that

> "courtroom photographing or broadcasting or both would impose undue police duties upon the trial judge[,] . . . that the broadcasting and the photographing in the courtroom might have an adverse psychological effect upon trial participants, judges, lawyers, witnesses and juries[,] . . . [and] that partial broadcasts of trials, particularly on television, might influence public opinion which in turn might influence trial results. . . ." *Id.* at 645.

Following the presentation of the Bar-Media Conference Committee report and in connection with the consideration of a report and recommendation of a Special Committee of the American Bar Foundation created in July, 1955 (83 A. B. A. Rep. 643-45 (1958)), the House of Delegates conducted a hearing as a "Committee of the Whole" during its February, 1958 session at which proponents and opponents of Judicial Canon 35 were fully heard. 83 A. B. A. Rep. 648-69 (1958). Thereafter, at the August, 1958 meeting of the House of Delegates, it was decided to have a Special Committee study Canon 35 and

> "conduct further studies of the problem, including the obtaining of a body of reliable factual data on the experience of judges and lawyers in those courts where either photography, televising or broadcasting, or all of them, are permitted. . . . The fundamental objective of the Committee and of all others inter-

* 42 A.B.A.J. 834, 838, 843 (1956).

ested must be to consider and make recommendations which will preserve the right of fair trial." 83 A. B. A. REP. 284 (1958).*

The Special Committee filed an Interim Report and Recommendations with the House of Delegates in August, 1962 setting forth the "Area and Perspective" of its survey and studies. The report included portions of testimony by media representatives taken at a hearing held in Chicago on February 18, 1962, as well as a summary of the Committee's informal conference with certain representatives from Colorado and Texas. In addition, the report included written comments by officers of State Bar Associations responding to a Committee survey, and certain general correspondence received by the Committee regarding Judicial Canon 35. The report also listed significant publications favoring either revision or retention of the Canon. (Ten copies of this report have been filed with this brief for the convenience of the Court. It is cited hereafter as *Int. Rep.*)

The Special Committee thereafter submitted its final report and recommendations, concluding that the substantive provisions of Judicial Canon 35 remain valid and "should be retained as essential safeguards of the individual's inviolate and personal right of fair trial." (This report is reprinted as an Appendix hereto.) The Committee did recommend certain minor deletions (bracketed) and changes (italicized) which were adopted by the House of Delegates, after full debate, on February 5, 1963:

> "The taking of photographs in the court room, during sessions of the court or recesses between sessions,

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* The successive Chairmen of this Special Committee were Whitney North Seymour of New York, Richmond C. Coburn of St. Louis, and John H. Yauch of Newark, all of whom have been appointed by President Lewis F. Powell, Jr. as a special committee to prepare and file this brief, the filing of which was duly authorized by the Association's Board of Governors. On February 5, 1963 this action was approved by the House of Delegates. This committee has had the benefit of the assistance, in preparing this brief, of Gerald M. Levin of the New York Bar and of Roy G. Bowman of New York.

and the broadcasting or televising of court proceedings [are calculated to] detract from the essential dignity of the proceedings, distract [the] *participants and* witnesses in giving [his] testimony, [degrade the court] and create misconceptions with respect thereto in the mind of the public and should not be permitted."*

A vast majority of the states have voluntarily adopted Judicial Canon 35 in one form or another, and it has been embodied in principle in Rule 53 of the Federal Rules of Criminal Procedure. In a recent Resolution of the Judicial Conference of the United States, the philosophy of Canon 35 was unanimously reaffirmed:

> "Resolved, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court." *Jud. Rep.* p. 97.

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* The full text of Judicial Canon 35, as amended, is as follows:

"IMPROPER PUBLICIZING OF COURT PROCEEDINGS

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

Since 1956, two states, Colorado and Texas, have, by court rule or practice, left to the discretion of individual judges the decision of whether to permit the broadcasting of trials.* The Colorado rule resulted from a report by Justice O. Otto Moore, as Referee, which was adopted by the Supreme Court of Colorado sitting en banc. *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 296 P. 2d 465 (Colo. Sup. Ct. 1956). There the individual trial judge's discretion to allow telecasting is subject only to the objection of a witness or juror under subpoena but not to defendant's objection; but apparently, in practice, the Colorado courts now recognize that television should not be allowed in the courtroom unless the defendant consents. *Int. Rep.* pp. 19-20. Under the Texas practice, no witness may be photographed over his express objection, and the media must first obtain permission from the court. The right to object is evidently not afforded to the defendant. *Int. Rep.* p. 74; *Appendix* p. 21.**

Statement

The Association adopts Petitioner's Statement except insofar as it wishes to emphasize the following facts.

Petitioner was indicted for swindling under the Texas Penal Code (R. 1-7). After a change in venue, the case was first called on September 24, 1962 (R. 8). A hearing was held to consider petitioner's motion to prohibit telecasting and for a continuance, which lasted through September 25 and which itself was televised "live" (R. 19, 82), with commercial messages (R. 71, 85, 89-90). An edited "tape" of the first day's proceedings was shown that night on television in place of the evening movie, with the normal commercials being inserted periodically (R. 58, 87). The jury panel was called and sworn before the cameras (R. 59) on September 25 (R. 57).

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* See also the Oklahoma practice referred to at p. 30, *infra*.

** See Judicial Canon 28, Canons of Judicial Ethics, Integrated State Bar of Texas, approved September 27, 1963 (Petition for Certiorari, p. 19 & pp. 50a-51a).

The motion to preclude telecasting was overruled (R. 54). The trial was continued until October 22, and in the interim, a local television station, with the approval of the court (R. 70), constructed a booth in the rear of the courtroom with an opening across the top providing access for camera lenses (R. 19). The opening argument for the State was televised "live", but because of transmission difficulties there was no picture (R. 20). The closing argument for the State was fully televised, with the cameras "directly trained" on the State's attorneys and the jury (R. 17). The return of the verdict by the jury and its acceptance by the court were also telecast (R. 20). At the request of petitioner's attorneys, the cameras were ordered not to be on them and the sound turned off while they addressed the jury (R. 134-35); instead, the cameras were directed at the judge and the arguments monitored by audio equipment and relayed by a news announcer (R. 17).

The rest of the trial was telecast on film, without sound, and used on newscasts later in the day (R. 20, 131). Radio broadcasts in the form of spot news reports were made from a room next to the courtroom, between a hall and the end of the jury box (R. 99-100).

Summary of Argument

The trial court deprived petitioner of his right to a fair trial under the due process clause of the Fourteenth Amendment by permitting the trial to be televised over his objection. Included within this right of fair trial are certain Sixth Amendment guarantees, the right to an impartial jury and judge, the right of confrontation, and the right to counsel, which must be safeguarded by the States as essential elements of fundamental fairness. The impact of television on each of the trial participants seriously interferes with the exercise of these fundamental rights.

By acceding to media requests in selecting petitioner for trial on television, the trial court deprived him of the equal protection of the laws. The fact of petitioner's notoriety cannot justify the prejudicial introduction of a

vast electronic audience into the courtroom while other defendants are spared this intrusion. The trial court, by refusing to follow the inhibitions also embodied in Judicial Canon 35, infringed the Constitutional principles of fair trial and equal protection which the Canon reflects.

The right to a public trial implies no Constitutional right of the television camera to be in attendance at court. This is a defendant's right, intended for his protection, not for what may be his undoing. Nor is there any right of free speech or press which might be violated by banning television from the courtroom. What is involved is not freedom of expression but simply the regulation of access to the courtroom by certain media equipment. The right of individual defendants and of the public to fair trial is too important to be subordinated to other interests.

ARGUMENT

I

Television in the courtroom denied Petitioner his right to a fair trial under the due process clause of the Fourteenth Amendment.

The due process clause of the Fourteenth Amendment guarantees the accused those fundamental rights which are essential to a fair trial. *Gideon* v. *Wainwright*, 372 U. S. 335, 340-41 (1963); *Powell* v. *Alabama*, 287 U. S. 45 (1932). Certain Sixth Amendment rights specifically safeguarded in federal court, because of their fundamental nature, also come within the ambit of Fourteenth Amendment protection and are therefore binding on the States. Each of these rights, the right to an impartial jury and judge, the right of confrontation, and the right to counsel, are necessarily impaired by the introduction of television into the courtroom. Each one of the trial participants, be he juror or judge, witness or lawyer, is so likely to be adversely affected by the camera's stare that he would be unable to function in a manner consistent with the requirements of fair trial.

A. The Right to an Impartial Jury

Although the States need not provide that all criminal trials be by jury, see *Turner* v. *Louisiana*, 33 U. S. L. WEEK 4137, 4139 (January 19, 1965); *Irvin* v. *Dowd*, 366 U. S. 717, 721 (1961); *Palko* v. *Connecticut*, 302 U. S. 319, 324 (1937), when a jury trial is provided, that jury must be impartial. *Irvin* v. *Dowd*, *supra* at 721-22 (newspaper publicity engendered atmosphere precluding an impartial jury); see *Moore* v. *Dempsey*, 261 U. S. 86 (1923) (mob domination prevented impartial trial); *cf. Rideau* v. *Louisiana*, 373 U. S. 723 (1963) (televised confession required change of venue). For example, this Court has recently held that the continual association of jurors and witnesses outside the courtroom so prejudices the jury as to "undermine the basic guarantees of trial by jury. . . ." *Turner* v. *Louisiana*, *supra* at 4140.

Thus, the right to an impartial jury means simply that a defendant is entitled to a fair verdict rendered by jurors unmarked by prejudice and outside influence. The presence of television in the courtroom precludes such a verdict.

Initially, potential or actual jurors, in the absence of enforceable and effective safeguards, may arrive at certain misconceptions regarding the defendant and his trial by viewing televised pre-trial hearings and motions from which the jury is ordinarily excluded. Evidence otherwise inadmissible may leave an indelible mark. In the case at bar, one of the jurors apparently saw the televised version of petitioner's motion to prevent telecasting and for a continuance. (Petition for Certiorari, p. 25.)

Once the trial begins, exposure to nightly rebroadcasts of selected portions of the day's proceedings will be difficult to guard against, as jurors spend frequent evenings before the television set. The obvious impact of witnessing repeated trial episodes and hearing accompanying commentary, episodes admittedly chosen for their news value and not for evidentiary purposes, can serve only to distort the jurors' perspective. See Cantrall, *A Country Lawyer Looks at Canon 35*, 47 A. B. A. J. 761, 763 (1961).

Despite the court's injunction not to discuss the case, it seems undeniable that jurors will be subject to the pressure of television-watching family, friends and, indeed, strangers. "We lawyers know that unfortunately a word dropped outside the courthouse to a juror sometimes has more influence than the evidence itself." Tinkham, *The Bar and Canon 35*, 19 F. R. D. 19, 24 (1955). It is not too much to imagine a juror being confronted with his wife's television-oriented viewpoint. Tinkham, *Should Canon 35 Be Amended?*, 42 A. B. A. J. 843, 884 (1956). Additionally, the jurors' daily television appearances may make them recognizable celebrities, likely to be stopped by passing strangers, or perhaps harried by intruding telephone calls. Possible loss of business or other economic injury is only one fear which may become fact because of involvement in an unpopular decision. See Letter from Peter H. Gerns, *Int. Rep.* p. 63.

The inhibiting effect on a jury which knows that the return of its verdict and its acceptance by the court will be carried across countless television screens (R. 20) is incapable of precise measurement. The very fact of television inevitably impresses on the jury that this particular trial is of some undefined special importance (R. 15). In such an atmosphere, it is virtually impossible for the court to establish appropriate safeguards to keep the jury unswayed by the force of public opinion and attentive to the evidence in the courtroom. See Letter from Herman S. Merrill, *Int. Rep.* p. 35. Mass opinion conveyed through the peering lens is surely "anathema to the very conception of a fair trial." Douglas, *The Public Trial and the Free Press*, 46 A. B. A. J. 840, 844 (1960).

Ultimately, television will preclude the rendering of an impartial verdict in those cases most in need of disinterested adjudication and most likely to be televised—the criminal trial of an unpopular or infamous defendant. Needless to say, the rights of all are secure only if the rights of the most detested are vindicated according to the rule of law.

B. The Right to an Impartial Judge

The trial judge plays a pivotal role in sustaining the atmosphere of impartiality mandated by the Sixth Amendment,* *cf. Glasser* v. *United States*, 315 U. S. 60, 82 (1942), and the Fourteenth. Thus, fundamental fairness requires that the presiding judge have no interest in the outcome of the trial. *Tumey* v. *Ohio*, 273 U. S. 510 (1926),

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." 273 U. S. at 532.

In addition, the trial judge cannot occupy a position adverse to the defendant. He cannot be, for example, complainant, indicter and prosecutor. *In re Murchison*, 349 U. S. 133 (1955). It is not necessary that actual bias be shown; due process precludes even the probability of unfairness.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored to prevent even the probability of unfairness.* To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison, supra* at 136 (emphasis added).

This requirement of an impartial judge attending to the administration of the trial and adjudication of testimony.

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* The right to an impartial judge derives from the Sixth Amendment right to a public trial by a fair and impartial jury, as well as from the broader due process provision of the Fifth Amendment. See, *e.g.*, *United States* v. *Hill*, 332 F.2d 105 (7th Cir. 1964); *Riley* v. *Goodman*, 315 F.2d 232 (3d Cir. 1963); *cf. Baker* v. *Hudspeth*, 129 F.2d 779 (10th Cir.), *cert. denied sub nom. Baker* v. *Hunter*, 317 U.S. 681 (1942).

and argument without extraneous influence is incompatible with the distractions of television. There are severe pressures involved in the very decision to allow television admission, in policing the courtroom once access has been allowed, and in appearing as one of the prime actors in the televised drama. Judicial energies and deliberative capacity should not be thus diverted from the true business of the court—the fair trial and decision of the case at hand. To adhere to Lord Mansfield's classic standard of the impartial and independent judge:

> "I wish popularity: but, it is that popularity which follows; not that which is run after. It is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends, by noble means. I will not do that which my conscience tells me is wrong, upon this occasion; to gain the huzzas of thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow." *Rex* v. *Wilkes*, 4 Burrow's 2527, 2562 (K. B. 1770).

would be difficult, if not impossible, when the pressure of public opinion is brought to white heat by television.

It is apparent not only that individual judges should not have the discretionary power to introduce television into the courtroom, but that they should be protected from even having to consider the issue. Griswold, *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered*, 48 A. B. A. J. 615, 616 (1962). Intense pressure from the media for full access is bound to affect the judge's outlook: if he decides not to allow television, he will be subjected to the charge of "discrimination," of being "old-fashioned," and of showing less concern for the public than fellow judges who have allowed it. *Id.* at 617. Disfavor of the media can, unfortunately, have a profound impact on the chances of re-election for a closed-circuit judge. *Ibid.*

see Letter from Judge Henry S. Stevens, *Int. Rep.* p. 39. Moreover, his manner of deciding not only whether to admit television but, once admitted, of disposing of the recurring requests to take certain pictures may often give the erroneous impression that he is preventing complete disclosure. See Letter from Judge John J. Walsh, *Int. Rep.* p. 62. On the other hand, the many rulings required once the courtroom door is opened may appear, if they are not in fact, affected by a sensitivity to media coverage and criticism. See R. 10.

If a judge is to bear the burden of policing the cameras, he can hardly avoid getting involved in all sorts of technical aspects of television, almost as if he were a part of the crew. As in the case at bar, he may have to instruct the television personnel not to "pick up" lawyer-client conferences (R. 49-50); he may have to make specific rulings regarding camera placement or angle (R. 52, 61, 77), as well as noise in the courtroom caused by camera equipment and personnel (R. 55); and he may have to pass on the plans for physically incorporating the equipment into the courtroom structure (R. 70). See also Letter from Judge Raymond W. Fox, *Int. Rep.* pp. 56-57 (pointing to example of trial judge who "forgot to turn off the sound when he was discussing a matter with the attorneys at the bench which should not have gone over the air").

Finally, there is the direct impact of appearing on stage as the center of television attention. "Some judges will be unable to forget that a million eyes are upon them." Griswold, *supra* at 616.

In sum:

> "The recognition of the need of the power of the trial judge . . . to ban television . . . is in itself an admission of the potential danger. Why then risk the danger? Why make the judge divert himself so that he cannot devote his full time and energy to the testimony which is being presented? Why put a judge in a position of making a decision which is unpopular and not understood by the television viewers at the pos-

> sible expense of injuring the rights of the litigants?" Letter from Judge Henry S. Stevens, *Int. Rep.* p. 46.

It does not denigrate the judiciary to have judges required to stick to the aspects of the judicial administration of cases and their courtrooms for which they are trained and equipped.

C. The Right of Confrontation

The Sixth Amendment provides that the accused in a criminal trial shall have the right "to be confronted with the witnesses against him." This right of confrontation consists of the traditional right to cross-examine adverse witnesses. See 5 WIGMORE, EVIDENCE § 1397 (3d ed. 1940).

In *Willner* v. *Committee on Character and Fitness*, 373 U. S. 96 (1963), the Court held that a State bar applicant was denied due process when he was not permitted to cross-examine adverse witnesses regarding his fitness for admission to the bar. A fortiori, the right of cross-examination applies in State criminal proceedings. *E.g.*, *Grey* v. *Wilson*, 230 F. Supp. 860 (N. D. Cal. 1964). What has been called the Anglo-American legal system's greatest contribution to justice, 5 WIGMORE, *op. cit. supra*, § 1367, at 29, has been embraced within the Fourteenth Amendment. As stated in *In re Murchison*, *supra* at 134:

> "due process requires as a minimum that an accused be given a public trial after reasonable notice of the charges, have a right to examine witnesses against him, call witnesses on his own behalf, and be represented by counsel."

This right to confront and cross-examine, as well as to introduce rebuttal testimony, is stripped of all meaning when a trial is televised.

The practicing lawyer knows the difficulty of arranging the attendance of witnesses under present conditions. They are often afraid; unaccustomed to appearing or speaking in public; and plagued by the gnawing doubt that they will be unable "to do justice to the facts and to themselves."

Cantrall, *supra* at 761. Already reluctant, the potential witness facing the possibility of being televised "for the world to see his struggle to express himself and to outwit the cross-examiner" will be that much more unavailable. *Ibid.* The timid will inevitably shrink from attendance, while the outgoing will fear that momentary lapse or gesture—amusing or ridiculous for all to see—caught and fastened by the camera, for the possible entertainment of millions. See Letter from Russell J. O'Malley, *Int. Rep.* pp. 66-67. See also Letter from Robert P. Hobson, *Int. Rep.* pp. 29-30; Letter from Willard L. Phillips, *Int. Rep.* pp. 54-55. And to have to subpoena the reluctant witness to compel him to undergo the publicity he dreads will only heighten the already distracting presence of the television lens. See Cantrall, *supra* at 761.

Once he begins to testify, the witness who does appear will be ever conscious of being televised not only on direct examination, but significantly on cross-examination where he will be embarrassingly forced to retrace his steps and less likely to recant under the gaze of such a vast audience. The operation of this adversary prodding, designed as it is for getting that much closer to the truth, is difficult enough under normal courtroom circumstances but is completely thwarted by the camera's mystic beam.

The televised witness will be even more prone to edit, tinge, or alter his words. See Letter from Thomas K. Younge, *Int. Rep.* pp. 47-48. Not only in words but in actions, reactions, and facial expressions will the witness respond differently by being electronically on view — and this may vitally influence the jury. See Letter from Hon. Arthur J. Murphy, *Int. Rep.* p. 54.

> "Most witnesses when testifying are tense, some are outright nervous. Anything which intensifies that condition affects the witness, his testimony and the outcome of the trial." Letter from J. A. Rinehart, *Int. Rep.* p. 65.

Tensions are bound to increase when a witness feels the omnipresent audience watching every expression, following

each word. Douglas, *supra* at 842; see 83 A. B. A. Rep. 655 (1958). The witness' preoccupation with personal appearance and dress are bound to be magnified, causing a more self-conscious and less direct presentation. See 62 A. B. A. Rep. 863 (1937).

Thus, television will have a "disastrous effect upon the natural and straightforward character" of a witness' testimony. Consciously or unconsciously, he will "attitudinize", thereby diverting the traditionally regulated form of testimony and cross-examination. Allen, *Fair Trial and Free Press*, 19 F. R. D. 36, 42 (1955).

It should be added that the defendant himself, like the witness, will presumably be that much more reluctant to testify on his own behalf, will be that much more strained when testifying, and will be nervously and consciously on view to the television audience throughout the trial, all to his own prejudice.

D. The Right to Counsel

The right of a criminal defendant to have the assistance of counsel is, of course, a fundamental element of fair trial which applies to the States, as this Court recognized in *Gideon* v. *Wainwright*, *supra*. *Cf. Powell* v. *Alabama*, *supra*. This is no naked right, for defendant is entitled not only to have counsel but to have the adequate and effective assistance of counsel. *E. g.*, *Jones* v. *Cunningham*, 313 F. 2d 347 (4th Cir.), *cert. denied*, 375 U. S. 832 (1963) (failure to appoint counsel for an indigent defendant early enough to permit adequate preparation held to constitute a denial of the right to effective assistance).

Counsel cannot represent conflicting interests or owe loyalty elsewhere without violating a defendant's Sixth Amendment guarantee of "assistance" and, therefore, his Fourteenth Amendment due process protection. See *Glasser* v. *United States*, *supra* at 70; *cf. Von Moltke* v. *Gillies*, 332 U. S. 708, 725-26 (1948). Nor is a defendant adequately represented if counsel is so impeded by his estimation of the facts that his conscience prevents him from arguing

before the jury on behalf of his client. See *Johns v. Smyth*, 176 F. Supp. 949 (E. D. Va. 1959).

The transformation of the courtroom into a "moving picture theater" is a distraction which cannot help but unconstitutionally impair the undivided effectiveness of counsel (R. 65). As stated by petitioner's counsel at trial:

> "the presence of all of the equipment that is here deprives the Defendant of due process in this trial in that it deprives . . . him of an opportunity to consult with his attorneys at the counsel table accurately; it deprives his attorneys of an opportunity to properly represent him in that it interferes with their handling of the case; it interferes with their conferences between each other; it interferes with their thought processes; it interferes with their interrogation of the witnesses and their comments to the Court and to the jury, because it is distracting and because it invades the privacy of the counsel table. . . ." (R. 53).

There is also a unique element of adequate representation here: to the extent that the great majority of lawyers in this country wholeheartedly subscribe to the principles of Judicial Canon 35, a serious conflict may arise when one of these lawyers is required to participate in a televised trial. Personal "outrage" may so color his feelings as to interfere with the rendering of his best services to his client (R. 23).

More broadly, lawyers, like others, may be affected by the presence of television cameras and become concerned, if only subconsciously, with their appearance to the world rather than thinking only of doing whatever is necessary, however unpopular that may be, to protect the rights of their client on trial. See Douglas, *supra*, at 842. What might normally be courtroom drama can easily turn into a prejudicial spectacle at the camera's prompting. See Tinkham, *Should Canon 35 Be Amended?*, 42 A. B. A. J. 843, 845 (1956). The already sensational atmosphere generated by the fact that a particular case was television-worthy might sometimes encourage an elected prosecutor

or a defense counsel to concentrate on the larger stage rather than devote every ounce of energy and thought to the cause on trial and the interests he represents there.

II

Petitioner has been deprived of the equal protection of the laws by having his trial selected for television.

Since the presence of television in the courtroom has the inevitable effect of invading petitioner's basic trial rights,* see Point I, *supra*, any rule or practice which gives the trial judge discretion to permit the televising of judicial proceedings will automatically deny the petitioner the "equal protection of the laws".

> "'Equal protection of the laws' . . . includes the right to be tried and punished in the same manner as others accused of crime are tried and punished. . . ." *Lynch* v. *United States*, 189 F. 2d 476, 479 (5th Cir. 1951).

The practical effect of such discretion is that the judge will be confronted with media requests only in those cases involving the famous or the infamous; the deleterious effects of television will be visited on them alone.

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* It should be noted that petitioner is entitled to a new trial without having to show specific prejudice. For example, denial of the right to counsel justifies a reversal and a new trial without any inquiry into whether the presence of counsel would have resulted in an acquittal. See *Gideon* v. *Wainwright*, *supra*; *cf. Johnson* v. *Zerbst*, 304 U.S. 458, 467 (1938) (assistance of counsel a jurisdictional prerequisite in federal court). Similarly with the right of confrontation, a defendant need not show that had he been allowed to cross-examine, the witness would have departed from his original testimony. See *Willner* v. *Committee on Character and Fitness*, *supra*. In the case of impartiality of judge or jury, the fact of bias need not be affirmatively established as long as there is a probability that it may exist. See *Rideau* v. *Louisiana*, *supra*; *Tumey* v. *Ohio*, *supra*.

> "It is only the sensational in trials for which there is a sufficient public demand to justify the expense that is involved; and no amount of euphemistic analogy between a courtroom trial, on the one hand, and 'delicate operations' or 'the inauguration of presidents and the coronation of kings, queens and popes,' on the other hand, will gloss over the crude fact that only where this kind of publicity may do the most harm will it be most used." Letter from Harold Horvitz, *Int. Rep.* p. 31.

Clearly, if the practical effect of a rule or statute is to deprive a person of equal protection, it is invalid despite the fact that the invalidity does not appear on its face. See *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886).

The type of trial a person receives should not depend on the incidental fact that he is famous or that the crime he is accused of inflames the community. Compare *Smith* v. *Bennett*, 365 U. S. 708 (1961); *Griffin* v. *Illinois*, 351 U. S. 12, 19 (1956).

Equal protection of the laws demands, therefore, that television be excluded from the courtroom in all cases.

> "[W]hen exceptions are made and the trial opened up to broadcasting and television, the damage done may be too subtle to measure accurately.* . . . Since

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* Defendant should not be put to the burden of proving in every instance what "no amount of research can ever adequately measure". Letter from Allen H. Gardner, *Int. Rep.* p. 49. Compare *Gideon* v. *Wainwright*, *supra*, with *Betts* v. *Brady*, 316 U.S. 455 (1942). In *Gideon*, the Court recognized that the right to counsel had become so fundamental that it should no longer be left to "special circumstances" in each case as required by *Betts*. The burden of showing the subtleties of adverse effects on judge, jurors, witnesses, lawyers and parties, many of whom would shy away from admitting any such effects, would ordinarily be greater than the burden of showing the adverse consequences of the absence of counsel. With respect to demonstrating positively the impact of television on a fair trial, the Special Committee on Proposed Revision of Judicial Canon 35 has indicated "that a sound conclusion on this issue will not be obtained from a survey by a professional fact-finding organization. . . . Mr. Elmo Roper entertained considerable doubt as to whether such a project would produce truly reliable conclusions. . . ." *Int. Rep.* p. 9.

defendants' rights are the interests protected by the public trial the end is best served by banning all photography, broadcasting, and televising. The camel should be kept out of the tent, lest he take it over completely." Douglas, *supra* at 844.

III

The rule contained in Judicial Canon 35 reflects the fundamental Constitutional principles of fair trial and equal protection here involved.

It is the Association's position that the absolute ban on telecasting recommended in Judicial Canon 35 does not simply reflect an optional rule of orderly judicial administration but rather a Constitutional requirement stemming from the fair trial-equal protection guarantees of the Fourteenth Amendment.

Canon 35 recognizes that telecasting "detract[s] from the essential dignity of the proceedings". This is not simply devotion to the pomp and grace of a bygone era, but an acknowledgment that decorum is essential to the reasoned search for truth. The atmosphere generated by dignified and orderly proceedings provides the necessary "laboratory" environment for dispassionate adjudication of human rights. See Wilkin, *Judicial Canon 35 Should Not Be Changed*, 48 A.B.A.J. 540 (1962).

Television destroys this essential environment of "fitting dignity and decorum" not because cameras and lights, microphones and wires, physically obtrude, but because of the very fact of its presence. It is not the noise and disturbance which is at issue, for technology can remove the tangible effects; rather, it is the inevitable psychological impact of the television lens. Griswold, *supra* at 617. Damage results not because the equipment is in plain view, but because, even if it cannot be seen, the subject knows he is or is apt to be televised. Tinkham, *Should Canon 35 Be Amended?*, 42 A.B.A.J. 843, 845 (1956).

> "[H]owever unobtrusively . . . television cameras might be used, the very knowledge that the court-

> room has become a 'live' theatre — and the judges, lawyers, jurors, defendants, and witnesses have become performers — would tend to distract from the true and only purpose of the trial. . . . None of this would help to maintain the sober atmosphere essential in preserving the most fundamental freedom of all — the right to get a fair trial." Editorial, *Toledo Blade*, Feb. 25, 1962, quoted in Griswold, *supra* at 618.*

Canon 35 further acknowledges that television "distract[s] participants and witnesses in giving testimony". This is a recognition of the subtle but potent effect of television upon our most revered fair trial traditions. The orderly interaction of each of the trial participants and the regulated presentation of evidence are precluded. Actors on camera can never be unself-conscious and effective trial participants. See WILLIAMS, ONE MAN'S FREEDOM 228 (1962), quoted at p. 89 of *Int. Rep.*

Finally, the Canon reflects the fact that television will "create misconceptions with respect [to court proceedings] . . . in the mind of the public". The addition of television can only serve to heighten the prejudicial public clamor which already surrounds the notorious trial, the trial most likely to be televised.** In fact, time limitations and public

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* Obviously, the sober atmosphere is particularly vulgarized by commercial sponsorship of such telecasts. Douglas, *supra* at 843.

** The overriding issue involved here was adverted to in the REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY (Washington, D. C. 1964):

> "The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime." *Id.* at 240.

The matters which the Commission recommended for consideration by the media and the bar are under study by an Advisory Committee of the American Bar Association under the Chairmanship of Hon. Paul C. Reardon of Massachusetts and of a Special Committee of The Association of the Bar of the City of New York under the Chairmanship of Hon. Harold R. Medina, but the question of television in the courtroom was settled for the American Bar Association by the action of the House of Delegates in 1963 (*supra*, p. 7).

interest would limit the media to selected portions of the most sensational trials. See Letter from Herman S. Merrill, *Int. Rep.* p. 34. There would be no visual "record" of the trial, only edited episodes selected not for relevance and evidentiary value but for newsworthiness and to satisfy public curiosity. See Cantrall, *supra* at 762.

Canon 35 embodies not only due process considerations, but in its uniform prohibition against the televising of trials, expresses the concern of the legal profession for equal protection for all defendants.

> "A courtroom is not a stage; and witnesses and lawyers, and judges and juries and parties, are not players. A trial is not a drama, and it is not held for public delectation, or even public information. It is held for the solemn purpose of endeavoring to ascertain the truth; and very careful safeguards have been devised out of the experience of many years to facilitate that process. It can hardly be denied that if this process is broadcast or televised, it will be distorted. Some witnesses will be frightened; some will want to show off, or will show off, despite themselves. Some lawyers will 'ham it up'. Some judges will be unable to forget that a million eyes are upon them. *How can we say that our primary concern is the equal administration of justice if we allow this to be done?*" Griswold, *supra* at 616 (emphasis added).

Those who favor cameras and broadcasting equipment in courtrooms sometimes assert that Canon 35 discriminates against radio and television in favor of the press. There is no such discrimination. The press is also subject to photography restrictions. Moreover, the press is not permitted to report directly from the courtroom — its printing presses are far removed. Similarly, radio and television reporters are equally free to take notes and send them outside the courtroom over their own broadcast "presses". See Griswold, *supra* at 616.

IV

Neither the right to a public trial nor freedom of the press requires that television be accorded access to the courtroom.

Those who favor television cameras in courtrooms sometimes also claim that this is necessary to insure a public trial and is a part of freedom of the press. But such arguments are plainly mistaken.

The right to a public trial, which is specifically granted in the Sixth Amendment, has been held to be of such fundamental importance as to be incorporated into the Fourteenth Amendment. This Court has said that:

> "In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus [secretly] sentenced to prison." *In re Oliver*, 333 U. S. 257, 273 (1948).

Although the salutary effect of public exposure has been explained on several grounds, see 1 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 522-37 (1827), it has come to be regarded as a right which is designed for the protection of the accused. Radin, *Right to a Public Trial*, 6 TEMPLE L. Q. 381, 389 (1932).

> "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the require-

> ment is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether." 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927).

Despite the necessary role which the public plays in securing this right, it is primarily the right of the individual defendant. The public interest in any particular trial can rise no higher than the standards of fair trial will permit. In *Tribune Review Publishing Co. v. Thomas*, 153 F. Supp. 486 (W. D. Pa. 1957), *aff'd*, 254 F. 2d 883 (3d Cir. 1958), the district court, in denying an application to enjoin enforcement of a State court rule against taking photographs in the courtroom, cautioned that while recognizing the public interest it

> "must take cognizance of the fact that the constitutional right of the accused to a public trial is a privilege intended for his benefit. It does not entitle the press or the public to take advantage of his involuntary exposure at the bar of justice to employ photographic means to picture his plight in the toils of the law either while in jail, going or coming from court, or while actually in the court room." 153 F. Supp. at 495.

See also *In re Mack*, 386 Pa. 251, 126 A. 2d 679 (1956), *cert. denied*, 352 U. S. 1002 (1957); *State v. Clifford*, 162 Ohio St. 370, 123 N. E. 2d 8 (1954), *cert. denied*, 349 U. S. 929 (1955).

Similarly, in *United Press Ass'n v. Valente*, 308 N. Y. 71, 123 N. E. 2d 777 (1954), the court denied an application made by the press to restrain the trial court from excluding the public and the press. The court held that the press as

representative of the public had no legally enforceable right to be present at the trial.* In emphasizing that the right to a public trial is a defendant's right, the court noted:

> "Actually, petitioners [the press] are seeking to convert what is essentially the right of the particular accused into a privilege for every citizen, a privilege which the latter may invoke independently of, and even in hostility to, the rights of the accused. A moment's reflection is enough, we suggest, to demonstrate that that cannot be, for it would deprive an accused of all power to waive *his* right to a public trial and thereby prevent him from taking a course which he may believe best for his own interests." 308 N. Y. at 81, 123 N. E. 2d at 781 (emphasis in original).

Nor does the guarantee of freedom of the press secure to the public the right to attend trials. Freedom of the press protects the right to disseminate ideas and, in some cases, the right to be harshly critical of a particular court's approach to legal problems and their resolution. See, *e.g.*, *Craig* v. *Harney*, 331 U. S. 367 (1947); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Bridges* v. *California*, 314 U. S. 252 (1941). When the issue is the scope of fair comment permitted to an observer at a public trial, freedom of press and speech is involved and the doctrine of clear and present danger applies. *Craig* v. *Harney, supra; Pennekamp* v. *Florida, supra.*

But no matter how jealously guarded the right of freedom of press and speech may be, it does not and has never

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* The danger of elevating public trial into an overriding principle is clear:

> "Public trial is now a mockery in many world capitals—Moscow, Havana, and Peiping, for example, where the courtroom has been taken outdoors by the government itself to better accommodate and amuse the public; a tragic swing of the pendulum which we know the news media of this country would strongly oppose." Letter from Russell J. O'Malley, *Int. Rep.* p. 67.

been held to guarantee access to newsworthy material.* The Court of Appeals for the Third Circuit put the issue in its proper perspective when it said:

> "Realizing that we are not dealing with freedom of expression at all but with rules having to do with gaining access to information on matters of public interest, can it be argued that here there is some constitutional right for everybody not to be interfered with in finding out things about everybody else? We suppose it would not be contended that a newspaper reporter or any other citizen could insist upon entering another's land without permission to find out something he wanted to know. In the same way merely because someone's private letters might be interesting as gossip or as models of English composition it would hardly be argued that one could open another's desk and read through what he finds there. Could an interested observer insist on the constitutional right to take motion pictures of a private family in and about its household contrary to that family's wishes? We think that this question of getting at what one wants to know, either to inform the public or to satisfy one's individual curiosity is a far cry from the type of freedom of expression, comment, criticism so fully protected by the first and

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* Even those few cases which recognize that the public may have some enforceable right to attend trials despite the defendant's waiver of his right to public trial do not base their conclusions on the Constitutional right of free speech. See *E. W. Scripps Co.* v. *Fulton*, 125 N. E. 2d 896 (Ct. App. Ohio), *appeal dismissed as moot*, 164 Ohio St. 261, 130 N. E. 2d 701 (1955); *cf. Kirstowski* v. *Superior Court*, 300 P. 2d 163 (Cal. Dist. Ct. App. 1956).

It may be that the public has some right to see that an accused gets a public and fair trial. See *Levine* v. *United States*, 362 U.S. 610, 625 (1960) (Black, J., dissenting). But if such a right does exist it is not by virtue of the free speech guarantee, nor does it permit the public to demand to examine the evidence and testimony in any way it pleases. *Cf. D'Acquino* v. *United States*, 192 F. 2d 338, 365 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); *Gillars* v. *United States*, 182 F. 2d 962, 977 (D. C. Cir. 1950).

fourteenth amendments of the Constitution." *Tribune Review Publishing Co.* v. *Thomas*, *supra* at 885.

The inconsistent application of free press and speech to the question of granting permission to televise court proceedings is illustrated in the approach of the Oklahoma courts. In *Lyles* v. *State*, 330 P. 2d 734 (Okla. Crim. App. 1958), the court relied on the guarantee of freedom of speech and press to uphold the televising of a criminal trial. Subsequently, the same court held that the question of televising proceedings is within the discretion of the trial judge. *Cody* v. *State*, 361 P. 2d 307, 317 (Okla. Crim. App. 1961). But if the right to televise is based on free speech and press, it can only be curtailed by a showing of clear and present danger, *Craig* v. *Harney*, *supra*; *Bridges* v. *California*, *supra*; if the exercise of the right does rest in the discretion of the trial court, it bears no relation to these fundamental freedoms.

There can be no media complaint that radio and television reporters are treated less favorably than press reporters for they, too, are permitted access to the courtroom to prepare, with pencil and pad, for a subsequent newscast. The real complaint is

> "that they can't gather the news in the ways they prefer—with cameras and microphones. The media do not seek access to information. They have that. They want something more. It might be called 'freedom of the lens and microphone.'" Tinkham, *Should Canon 35 Be Amended?*, 42 A. B. A. J. 843, 844 (1956).

But it is clear that:

> "No valid argument can be made along this line. A guaranty of the right to say or print what you want, subject to abuse of the privilege, does not even imply a companion right to propagate what you say or write by any means that you choose. Certainly the right to publish the testimony of a witness grants no

right to stand beside him in the courtroom and repeat his testimony through a megaphone." Lyman, *Courts, Communications and Canon 35*, 46 A. B. A. J. 1295, 1297 (1960).

Conclusion

For the reasons stated it is respectfully submitted that the judgment should be reversed and the case remanded for a new trial.

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February 19, 1965.

APPENDIX

REPORT OF THE SPECIAL COMMITTEE ON PROPOSED REVISION OF JUDICIAL CANON 35

RECOMMENDATIONS*

I. The Special Committee on Proposed Revision of Judicial Canon 35, after investigation and study, concluded that the substantive provisions of Judicial Canon 35 remain valid and with minor deletions should be retained as essential safeguards of the individual's inviolate and personal right of fair trial. We therefore recommend the adoption of an amendment to Judicial Canon 35 by which the words bracketed will be deleted, and the words italicized are added, as follows:

Judicial Canon 35, Improper Publicizing of Court Proceedings

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings [are calculated to] detract from the essential dignity of the proceedings, distract [the] *participants and* witnesses in giving [his] testimony, [degrade the court] and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.

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* The recommendations were adopted by the House of Delegates February 5, 1963.

II. The Canons of Professional Ethics and the Canons of Judicial Ethics; as adopted by the American Bar Association, constitute the standards of policy recommended by the American Bar Association for the consideration and voluntary guidance of the rulemaking authorities of the states of the United States, and have the force of law only where voluntarily adopted and incorporated in state laws or as a rule of court. We recommend that the rulemaking authority of each state exercise the exclusive responsibility of adopting Canons of Ethics in the interest of state-wide uniformity, and avoidance of confusion and pressures that have resulted in some jurisdictions where magistrates or judges have individually adopted rules concerning the conduct of their courts.

REPORT

The Special Committee on Proposed Revision of Judicial Canon 35 submits the following report on its activities since the 1962 (San Francisco) annual meeting of the American Bar Association.

Some news media representatives have, since 1937, sponsored the proposal that present Judicial Canon 35 should, insofar as it recommends against photographing or broadcasting of court proceedings, be abolished, or that the judge of each court have discretion as to whether photography and broadcasting should be permitted. As a result of media contentions, the American Bar Association House of Delegates in 1958 adopted a resolution[1] to carry out recommendations of the Board of Governors of A.B.A. that there be created a special committee, composed of nine members of the Association designated by the President, to:

> . . . conduct studies of the problem . . . obtaining . . . body of . . . data . . . of experiences of judges and lawyers in . . . courts . . . where either photography, televising . . . are permitted . . . confer with representatives of . . . interested media . . . to report

[1] Interim Report and Recommendations, p. 2.

> to the House of Delegates the result of its studies and surveys. The fundamental objective . . . must be to consider . . . recommendations which will preserve the right of fair trial. . . .

Our committee has sought earnestly to be objective in its study of the various contentions of the media with respect to Judicial Canon 35. Our "Interim Report and Recommendations" filed with the House of Delegates in August, 1962, set forth the area and perspective of our survey and study, including an all day hearing in Chicago (February, 1962) during which prominent media representatives[2] expressed their views on the subject.

We are conscious of the importance of maintaining a normal and mutually respectful relationship between those charged with the administration of justice and those having responsibilities related to the dissemination of news. Public respect for, understanding of and confidence in the courts are greatly influenced by the manner in which the news media interpret and publicize the functions of the courts.

This concept was aptly stated by the Supreme Court of Florida,[3] as follows:

> There is little justification for a running fight between the courts and the press (and other media) on this question of fair trial and a free press. Both are sacred concepts in our system of government. Both are in one constitution and govern one nation of millions of individuals. All that is required to preserve both is for the press and the courts to place the emphasis on the Constitution instead of themselves.

Due to our realization of the vital importance of a genuine relationship between the legal profession and the gentlemen of the Fourth Estate, we have sought to explore all

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[2] *Id.*, p. 6.

[3] *Id.*, p. 9; *Brunfield v. Florida*, 108 S. E. 2d. 33.

facets of the problem. Thus, our Interim Report and Recommendations, under date of July 23, 1962, contained informative data and pro and con viewpoints on the Judicial Canon 35 issues.

The principal reasons advanced by media spokesmen for contending that Canon 35 either should be abolished or substantially changed, and our committee's conclusions with respect thereto, are set forth in summary form below:

I

Media Contention

> Our constitutional rights are hardly being served if we are barred while other segments of the press remain. There aren't two sets of rights—one protecting the newspaper reporter and another the news broadcasters; we are protected by the same Freedom of the Press; what applies to one must apply to the other.
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> • • •
>
> There are some who would permit us (T.V.) in the courtroom with a pencil and paper so long as we leave our tools—our cameras and microphones outside.[4]

Committee Conclusion

Radio and television reporters have exactly the same rights as the newspaper writer. Just as the newspaper reporter may come to court, observe the proceedings and report his observations in the press, so too may the radio or television reporter come to court, observe the proceedings and report his observations over radio or television. The newspapers may not send their cameras into the courtroom or into most state courtrooms any more than the other media.

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[4] *Id.*, p. 84.

II

Media Contention

It is contended that Judicial Canon 35 is restrictive of the freedom of the press and the public's "right to know;" that "star chamber" proceedings and criminal trials *in camera* would be avoided; that prohibiting media apparatus in the court restricts the constitutional right of a "public trial."

Committee Conclusion

We believe that such media contentions are misapplied when used to justify cameras and broadcasting in the courtroom. The right of free press and the guaranty of a fair trial are equally sacred constitutional privileges guaranteed in one Constitution. Differences exist on this phase of the subject because emphasis is placed on one constitutional right without sufficient recognition that each constitutional right cannot be isolated. We must consider our Constitution as one integrated charter of liberty.

> . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. *Justice Louis D. Brandeis*

We have borrowed from Justice Brandeis' philosophy without intending to connote to the media any other meaning than that apparently they adopt an inapplicable premise. The underlying principles with respect to public trial and freedom of the press are, we believe, misapplied by the news media in order to justify T.V. and radio in the courtroom.

The reason for public trial is to protect the accused against the ancient abuses of "star chamber" proceedings, when defendants in criminal cases were tried secretly and when no one other than the prosecution knew of the nature of the charges. The right of public trial, however, is the right of the defendant — not the right or privilege of the press. It is a misconception of the media representatives that the right of public trial requires throwing open the courtroom as if the main purpose of the trial is to satisfy the curiosity of a vast unseen audience.

Thomas M. Cooley, former Justice of the Supreme Court of Michigan and Professor of Law at the University of Michigan in his authoritative treatise "Constitutional Limitations,"[5] wrote:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would be drawn hither by a prurient curiosity, are excluded altogether.

III

Media Contention

> The decision as to photographing and broadcasting of trials should rest entirely with individual judges.

Committee Conclusion

The right to a fair trial does not belong to the trial judge to dispense or curtail as he sees fit. Rather it is a sacred right of the accused. The Interim Report and Recommendations of this committee solicited the views[6] on this subject of members of the bench and bar, and many have been forthcoming.

Our concept of "equal justice under law" is that it is best achieved by the guarantees of the "rule of law and not of men." Our committee has been constrained to make a special recommendation relating to this point, namely Recommendation II, wherein it is recommended that the rulemaking authority in each state exercise exclusive juris-

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[5] *Id.*, p. 86.

[6] *Id.*, p. 78.

diction in establishing rules of court so that state-wide uniformity results.

This recommendation does not imply lack of confidence in the ability or integrity of members of the bench in the several states. Our recommendation is intended to protect individual judges from having to determine in each case whether broadcasting should or should not be permitted. Our survey makes clear that trial court judges particularly would welcome the establishment of a uniform policy on this subject. Rather than imposing such additional burden on an individual judge, we believe that the decision should be made by the legal profession acting through the rulemaking authorities. If no judge in any state can allow broadcasting or televising by decision of the rulemaking authority of that state, then no judge can be criticized by the press, radio or television for refusal to allow broadcasting from his court. If broadcasting is permitted by one or two judges, particularly in states where they are elected, then there is bound to result great pressures on the remaining judges. As was stated by Dean Griswold:[7]

> It should be obvious that the way to protect the administration of justice against these pressures is to keep the door firmly closed.
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>
> . . . Insofar as a decision against broadcasting and televising is unpopular in certain quarters the brunt of the decision should be taken by the profession as a whole, and should not be shifted to individual judges.

IV

Media Contention

The electronic media and news photographers assert that trials can now be photographed and broadcast unobtrusively, which was not the case when the Canon was adopted.

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[7] *A.B.A. Journal*, July, 1962, Vol. 48, No. 7, p. 615.

Committee Conclusion

It is acknowledged that photography and broadcasting have made great advances in technology and techniques. Both play important roles in news reporting. Some forms of photographic and broadcasting equipment are less obtrusive than others. Yet the very presence in the courtroom of various photographic and sound devices, with operators working under the intensely competitive pressures of their craft, tends to cause distractions and are disruptive of the judicial atmosphere in which trials should be conducted.

We feel that despite the contentions of the media to the contrary a serious doubt exists that a fair trial can be guaranteed if Canon 35 is relaxed to the extent of permitting photography, radio or television coverage. We are confirmed in this belief by the experience in trials of cases, including results in those states where this form of coverage has been permitted, notably the Graham trial in Colorado and the Estes trial in Texas.

We feel that as long as a doubt exists that an orderly trial is possible, if the media are permitted to photograph and broadcast trials in the manner they request, the provisions of the Canon 35 should not be relaxed. The substantial advances during the past few years, in partially eliminating the physical distractions that existed in the earlier days of photography and broadcasting, do not constitute sufficient reason for allowing court access to such equipment.

Some media representatives assert that the policy embraced in Canon 35 is founded in discrimination against electronic reporting. Reference is made to the fact that church services frequently are televised. Thus, the conclusion is drawn: *If television is a proper instrument in the house of the Lord, it is not out of place in court.*

The faulty logic of this comparison is made clear in the editorial of the *Saturday Evening Post,* October 20, 1962, entitled, "No Place for Television," in which it was stated:

> The televising of church services is a far different thing from the prejudicing of a defendant's rights—even if the defendant is Billie Sol. Under law the

objective of any trial is justice, not publicity. Every effort should be made to maintain a calm, judicious atmosphere in the courtroom. Photographic coverage intrudes upon and disrupts this atmosphere.

V

Media Contention

It has been represented that "competitive pressures" would be eliminated because newspaper and broadcasting industries have offered voluntary pool arrangements which would limit the number of photographers admitted to the courtroom, and also, by the adoption of a voluntary code of conduct.

Committee Conclusion

The most recent example of the failure of any such voluntary system was clearly exhibited at the outset of the Billie Sol Estes trial. The following is *The New York Times* account of what happened:

> A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates.
>
> A microphone stuck its 12-inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. Cables and wires snaked over the floor.

This apparently unconscionable situation eventually was somewhat corrected by the trial judge requiring construction of a special screen to conceal the bulky equipment with lenses protruding. It can be contended that television and radio in general should not be judged by that example, and that we should respect the efforts of conscientious media representatives to establish uniformly high stand-

ards of news coverage. However, similar instances have come to our attention when the case was deemed sufficiently "newsworthy" and the competition was keen for electronic reporting advantages.

VI

Media Contention

It is contended by some media representatives that Canon 35 is "legislation beyond the authority of any professional association."

Committee Conclusion

The Canons of Professional Ethics which apply to lawyers, and the Canons of Judicial Ethics which are applicable to judges, are not legislative edicts. They are recommended standards of professional and judicial conduct. The original Canons of Ethics were promulgated in 1908 by the legal profession acting through its national association, the American Bar Association. They have been implemented through voluntary action of the courts and of state and local bar associations in adopting them in their exact or similar form.

Thus for more than a half century the Canons of Ethics of the American Bar Association have come to be generally recognized as the accepted standards of professional conduct nationally.

In the case of Judicial Canon 35, its adoption in 1937 came about through action of the House of Delegates, a deliberative body broadly representative of the profession as a whole. The House of Delegates includes representatives of all of the autonomous state bar associations, as well as delegates chosen by major local bar associations and various national legal organizations. It is the recognized policy forum of the profession.

There has been an unfortunate misconception among some media representatives as to the role of the American Bar Association with regard to the Canons of Ethics. It has been implied that the ABA has arrogated unto itself the

authority to dictate to judges and lawyers. This is not the case, since the Canons themselves have no statutory force. Their acceptance by lawyers and judges is a matter of voluntary choice; not compulsion. Nationwide adoption of the Canons with occasional exceptions or variations, has been a matter of state by state determination.

We trust that with this explanation it will be made clear that the policy as to broadcasting or photographing of court proceedings rests upon the ultimate determination of the legislative or judicial authority of each state.

This fact, when considered with the record that nearly all of the states have *voluntarily* adopted Judicial Canon 35 in one form or another, is, we submit, persuasive of the conclusion that the great majority of those charged with the responsibility of the administration of justice have concluded that the right of fair trial is best maintained and preserved by continuing in effect Judicial Canon 35.

Judicial Experiences[8]

A. United States Chief Justice Earl Warren, in his capacity as Chairman of the Judicial Conference of the United States, stated in a letter to the Chairman of the Special Committee:

> While it is not our practice to make public the work reports of the Conference Committees, I can say to you that the members of the Conference were unanimous in their belief that subjecting the courts to such practices (the taking of pictures during judicial proceedings) is inimical to the administration of justice. It was not a matter of first impression either with the Committee or the Judicial Conference because we have long had Rule 53 of the Federal Rules of Criminal Procedure, the wisdom of which the Conference has never doubted, and the Resolution of the Conference is but further implementation of it. I believe you may assume that it is the constant pres-

[8] Some names are withheld, but are available in Committee files.

sure which has been applied to negate the Rule that prompted the re-affirmation and extension of it by the Conference.

B. A trial court judge in a western state, upon being informed that news photographers were preparing to take photographs in his courtroom, invited them into chambers and informed them that such photography would be in violation of judicial ethics and would not be permitted. The judge sought the unanimous agreement of the remaining judges of like jurisdiction to adopt a written rule against photography, but did not succeed because some of the judges were in the midst of campaigns for re-election. The judge thereupon adopted and posted the rule prohibiting photography in his court.

The next day the local newspaper published a front page story which featured the judge's action and his photograph. Later, when the judge appeared as the principal speaker at a civic club during the campaign with photographers and news reporters present, it was pointedly made clear that no pictures of the judge would be taken. No picture of the judge or news stories appeared during the remainder of the campaign, although special coverage was given his opponent. The night before the election the local newspaper published an item which contained statistics concerning the appellate record of the judge. He alleged these to be false.

C. Superior Court Judge Henry S. Stevens[9] of Phoenix, Arizona, stated in a letter to the committee:

> This being an election year and I again being a candidate for re-election, it might be unwise for me to write this letter. However, I feel that these views must be expressed.
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> .... Woe be unto that judge who has sufficient courage to exclude photography in a celebrated case. I ven-

[9] Interim Report and Recommendations, p. 38.

ture to say he will not be dealt with in a kindly manner by the press. I know from bitter experience that disfavor with the press can be a pretty rough ordeal.

D. Thomas K. Younge,[10] Grand Junction, a former president of the Colorado State Bar Association, stated:

> At that time (1956) there was considerable pressure put upon Colorado Judges (all of whom were then and are now elective) by newspapers in editors columns and feature stories for the repeal of the Canon. There is no question in my mind that the individual judges of the Supreme Court were each aware that they must sooner or later stand for re-election and would need the support of the newspapers in their campaigns. I believe that they were thereby influenced in their decision, which as you know was to abolish Canon 35 and permit the taking of pictures and the broadcasting of proceedings at trials.

E. An Appellate Court Judge of Illinois,[11] formerly a trial court judge stated:

> It is a rare person who is able to subject himself to a photograph in a tense moment, without some distraction which reacts either in what is said or a facial expression. The administration of justice is too tenuous to ever permit this to occur in any case.

F. A Michigan Circuit Judge[12] stated:

> . . . I agree . . . that judges should not be placed in the difficult position of meeting the pressures which would be brought to bear upon them by the news

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[10] *Id.*, p. 47.

[11] *Id.*, p. 54.

[12] *Id.*, p. 57.

media. . . . I rely upon Canon 35. If the Canon is relaxed . . . the heat will be on.

G. The Committee on Judicial Ethics of the State Bar of Michigan in an opinion published in April 1960[13] took serious note of the powerful political incentives and effects (of the practice of permitting televised broadcasting) and the competitive political rivalries between members of the judiciary which would be compelled by permitting such broadcasts.

H. Oneida County (New York) Judge J. Walsh[14] commented:

> The constant pressuring by individuals for permission to take photographs often gives the improper impression that the court is attempting to conceal something, or to prevent complete publication on court matters.
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> • • •
>
> If Canon 35 is to be unchanged, then a definite and forthright statement to that effect should be issued.

I. Recently John B. Burke, Esq., of St. Paul, Minnesota, voluntarily wrote to judges of various branches of the judiciary in his state and inquired as to their opinion with respect to Canon 35. Answering letters:

Judge Underhill (Duluth): ". . . the rule is a very real protection for the trial judge."

U. S. District Court Judge Devitt (Minneapolis): "It shocks me to see television and photographic coverage of the Billy Sol Estes trials in Texas."

Superior Court Chief Justice Knutson (St. Paul): "Anyone who has had experience in a courtroom knows that many witnesses will be greatly influenced by the knowledge that they are being photographed or that they are appearing

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[13] *Michigan State Bar Journal*, May 1.

[14] Interim Report and Recommendations, p. 60.

on a television program. While the dissemination of news is important, I think in this area it is even more important that trials can be conducted as they should, unfettered by any influence such as this."

District Court Judge Mason, Fifth District (Mancato): "It is true that improved methods of photography for still, moving and television pictures, eliminate much of the former objection to pictures; in fact, many of the people in the courtroom would not know that a camera was being used. It is also perhaps true that photographers have as much right in a courtroom as reporters, and are considered as such. But I think the end result, Colorado and Texas notwithstanding, would be to unduly dramatize and magnify situations and parts of a trial out of proportion. Witnesses, by far the greater number of them, are in court for the first time, and to know that they might be the object of picture-taking or broadcasting would be bound to detract from the business at hand — the truth.

"The matter of determining whether broadcasting or pictures should be permitted in the courtroom, should not be left to the individual judge. The application of the canon should be uniform. I favor retention of Judicial Canon 35 in its present form."

William Merlin, President of Municipal Judges Association (Minneapolis) reported that the members of the Executive Committee of the Association agreed that:

> . . . Canon 35 is one of the bulwarks protecting the rights of parties and that no change should be made.
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> There was one other point that I wish particularly to make. Judges and other court personnel are under sufficient pressure as is from the news media. It would be more difficult for the judge and court personnel to maintain objectivity and proper judicial presence if such activities were going on.

District Court, Second District, Judge Leonard J. Keyes (St. Paul): "A suggested alternative which would permit

each judge to make his own determination relative to the presence or absence of certain communications media in the courtroom would be chaotic and even worse than an abolition or modification of the present canon."

Those who differ with the recommendations of our committee will no doubt state that we have only referred to incidents that apparently constitute a sound basis for our conclusion. In our Interim Report and Recommendations we set forth all of the views, both pro and con. As we view it our conclusions are warranted if abuses occur only in a small minority of cases. Under our system of justice it is not our object merely to seek justice for the majority. We seek it for all. In striving for the ideal, we may approach a greater capacity of man to do justice.

Proposed T.V. Test Experiment

A proposal was made at our public hearings for news media representatives on February 18, 1962, in Chicago by Richard E. Cheverton, President of the Radio-Television News Directors Association, that a series of experimental broadcasts of trials be undertaken at agreed locations. It was proposed that these tests be conducted by television stations under bar and court supervision as a means of demonstrating the efficacy of broadcast coverage of trials.

The proposal has received the careful consideration of members of this committee. As we stated in our Interim Report and Recommendations to the House of Delegates in August, 1962, we considered the proposal by the electronic media to have been made in complete good faith and to be significant "evidence of their willingness to objectively consider the issues involved."[15] Our evaluation of the proposal has included not only the mechanics of the test plan, but its relevancy to the many facets of the total problem.

While the experiments might tend to throw light on the technical and perhaps some of the procedural problems of courtroom broadcasting, we concluded they could not be

[15] *Id.*, p. 16.

fruitful in resolving the fundamental and complex issues bearing upon fair trial, and that therefore no positive purpose could be served by carrying the experiments forward at this time.

The experiments could not recreate conditions that would prevail in trials of transcendent national interest, such as the Dr. Sheppard trial in Clevelend, a Finch-Tregoff trial in Los Angeles, the Accardo trial in Chicago, or the Estes case in Tyler, Texas, to cite only a few recent examples. In all such instances the presence in the courtroom (or partially behind a partition) of T.V. cameras, microphones, sound equipment and technicians, in addition to the already exceptionally large conventional news corps, would present problems that would not exist under controlled test conditions. The very trials which would pose the greatest problems in this regard would, because of their "news value," be those which the media would be most anxious to broadcast.

We favor continued cooperation with media representatives because the administration of justice in a democracy cannot function properly without the enlightened and conscientious understanding of the media and press, as stated in our Interim Report. Traditionally, there has been a close affinity between the press and the bar. We respect the views expressed by Mr. John H. Colburn, who attended our committee meeting in Chicago as a representative of the American Society of Newspaper Editors as Chairman of its Freedom of Information Committee, and who is a past president of the Associated Press Managing Editors. Mr. Colburn, in his 1961-62 report to the American Society of Newspaper Editors annual convention at New Orleans, replying to the question "What can be done about it?" (Canon 35) wrote:

> Editors must do a better job with their own photographic staffs who are daily operating in public view. Many of the impressions of lawyers and jurists are formed not from courtroom operations, but from the activities of photographers and broadcasters in their coverage of major public events.

where the decorum of the press is often anything but dignified.[16]

This Committee has drawn what it considers to be a valid distinction between actual trials and ceremonial events occurring in courtrooms. We therefore have recommended the retention of the latter part of Judicial Canon 35, which approves broadcasting or televising naturalization proceedings and other court ceremonials, such as inductions of judges or patriotic programs. We believe such events are clearly distinguishable from trials involving the life, liberty or property rights of the individual citizen.

Colorado and Texas Experiences

Since 1956, two states, Colorado and Texas, have, by court rule or practice, left to the discretion of individual state court judges the decision to allow or disallow photography and broadcasting of trials.

Colorado. In Colorado, the rule resulted from a report by Justice O. Otto Moore, as Referee. The substance of the Colorado Rule is as follows:

> Proceedings in Court should be conducted with fitting dignity and decorum:
>
> Until futher order of this Court, if the trial judge in any court shall believe from particular circumstances of a given case, or any portion thereof, that the taking of photographs in court rooms, or the broadcasting by radio or television of court proceedings would detract from the dignity thereof, distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair trial, it should not be permitted: provided, however, that no witness or juror in attendance under subpoena or order of the court shall be photographed or have his testimony broadcast over his expressed objection: and pro-

[16] *National Press Photographer*, May, 1962, p. 12.

> vided, further, that under no circumstances shall any court proceeding be photographed or broadcast by any person without first having obtained permission from the trial judge to do so, and then only under such regulations as shall be prescribed by him.[17]

Apparently, the Colorado Rule delegates to each individual trial judge discretion as to whether to allow or disallow telecasting, etc., of court proceedings. Such individual judge's determination is subject only to the objection of a witness or juror under subpoena and is not subject to a defendant's objection.

Judge Joseph H. McDonald, who was the trial judge in the Graham murder trial in Colorado in 1958, in which the defendant was charged with placing a bomb on an airliner resulting in the loss of many lives, including the defendant's mother, interpreted the Colorado Rule as not affording the *defendant* the right to object to his trial being televised. Judge McDonald is quoted as saying:

> I didn't grant that request because I felt that the defendant himself, as to the general over-all coverage of the trial, has no rights in the premises, that it was up to the court to determine whether or not his rights were being violated and of course, I felt they were not being violated by permitting this type of coverage at this trial.[18]

The basis of not providing in the Colorado rule that a *defendant* shall not be photographed, or have his testimony broadcast over his expressed objection, apparently is that "the defendant himself has no rights in the premises."[19] Judge McDonald further stated: "... it was up to the court to determine whether or not his rights were being violated."

Such judicial judgment was made before the defendant's trial had commenced. Is indictment of itself a proper

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[17] Reported 296 P. 2d 465.

[18] *Broadcasting Magazine*, May 13, 1957, p. 143.

[19] Interim Report and Recommendations, p. 12.

basis, notwithstanding the presumption of innocence, for any judge to ignore or overrule a defendant's objection to having his trial televised?

The Colorado rule, while giving consideration to the objection of witnesses and jurors, does not by its provisions recognize the objection of a defendant whose liberty or property is involved and who is an unwilling participant in the proceedings, to an extent greater than a witness or a juror. It would appear that the exception in the case of a "witness or juror" is recognition of the personal right of "witnesses or jurors under subpoena or order of the court,"[20] regardless of the judge's views, to refuse to submit to being photographed or televised.

Apparently the inconsistency of not affording the same right to a defendant eventually was recognized informally by the Colorado court. That was made evident by an informal suggestion that resulted from a judicial conference of the Colorado Court, that T.V. etc., should not be allowed without the defendant's consent.[21]

It is by no means certain the obtaining of the consent of a defendant to the telecasting of his trial is a reliable practice to follow. On a number of occasions the courts have held that where a right is so fundamental as to be a vitally integrated component of the process of administering justice, such a right cannot be waived by the accused. The guarantee of a fair and impartial trial without interference or diversion could conceivably be such a right.

Texas. The controlling policy of the Texas courts is that "the control of trial coverage by various news media should be left in the trial courts" This resulted from a report of a Committee on Televising, Broadcasting and Photographing Court Proceedings dated October 25, 1957, to the President and Board of Directors of the State Bar of Texas,[22] which committee was appointed to investigate

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[20] *Id.*, p. 13.

[21] *Id.*, pp. 19-20.

[22] *Id.*, p. 74.

and make recommendations concerning the adoption by the State Bar of Texas of Canon 35. The chairman of the committee was Chief Justice Spurgeon E. Bell of the Court of Civil Appeals, First Supreme Judicial District. The committee reported:

> After thorough discussion, your Committee has concluded there is no need nor demand for the adoption of Canon 35 by the bar generally, or the public, and we recommend against its adoption.
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> * * *
>
> We feel the control of trial coverage by various news media should be left in the trial courts. They have inherent power to exclude or control coverage in the proper case in the interest of justice.

In connection with such control the committee declared that there should be no use of flash bulbs or other artificial lighting; no witness, over his expressed objection, should be photographed, his voice broadcast or televised; representatives of news media must obtain permission of the court to cover by photography, broadcasting or televising, and shall comply with the rules prescribed by the court.

Thus under the Texas system there is recognized only the right of a witness to object to being "photographed, his voice broadcast or be televised." Such right apparently is not afforded a defendant.

This judicial policy was enforced in the recent trial of Billie Sol Estes before District Judge Otis T. Dunagan, at Tyler, Texas, who ruled, over the objections of defendant's lawyer, that television and cameras would be permitted in the courtroom. The objection by counsel for the defendant was based on the contention that the presence of photographers and their cameras would prevent his client from having a fair trial. Photographs were made of the conditions within the courtroom and immediately adjacent to the court house, and prints of the photographs were made available to this committee. The court conditions as de-

picted by the photographs apparently are accurately described in the quote from *The New York Times*.[23]

"Broadcasting," a magazine published weekly by Broadcasting Publications, Inc., editorialized in its issue of October 1, 1962:

> The postponement of the trial to Oct. 22, for reasons having nothing to do with television, will give broadcasters a chance to tidy up their coverage plans of a trial that will attract national attention. If a remote van is to be used, let it be moved to a less obvious location. If live cameras are to be used, admit the absolute minimum and pool their coverage. If it is possible to erect some kind of screening to conceal both live and film cameras, by all means put up the screens under the direction of the best stage manager obtainable.
>
> In this case television is on trial with Mr. Estes. If tv loses in this court it has dimmer prospects on appeal than Mr. Estes will have if he loses.

At the postponed session of the court the several T.V. cameras were removed from inside and outside the bar to a position behind a partition, with lenses of several T.V. cameras projecting through an opening.

Our attention has been called to an incident that occurred in the David Frank McKnight hammer-wielder murder case in 1958 which was pending in the District Court at Amarillo, Texas. The local T.V. station applied to the court for permission to telecast the proceedings and the court conditioned approval on the defendant's consent. It is related that the defendant's consent was obtained in consideration of the payment of $1,000. No doubt this was an isolated instance, but it is indicative of the problems that may be added to the existing difficulties inherent in the administration of criminal trials.

Members of this committee have interviewed and corresponded with many judges, lawyers and officials within

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[23] See page 6 of this report.

Texas and Colorado. While some divergence of opinion was disclosed, a majority of the lawyers and judges interviewed in those states have reacted unfavorably to photography and broadcasting of trials. Actually, trials have been broadcast in surprisingly few cases. Whether this is due to broadcasters having lost interest in televising routine cases, or the unwillingness of some judges to permit broadcasting, is unclear.

Among the opinions received was that of Alfred P. Murrah, Chief Judge of the United States Court of Appeals for the Tenth Circuit, which includes Colorado, who recently wrote in response to our inquiry, as follows:

> I have given a lot of thought to revising Canon 35, and while the time may come when we must make some concessions, I am not ready to do it now. Certainly we cannot give ground without some safeguards, for if we leave it to the judges or to the media, we are lost—there is no half way ground.

As evidenced by the material contained in the Interim Report and Recommendations of our committee dated July 23, 1962, and information obtained thereafter from representative sources, our committee concluded that adequate and meaningful data on the experiences of judges and lawyers of Colorado and Texas with photographing, televising or broadcasting court trials had been obtained on which to base our recommendations on the fundamental objective of our assignment, namely, "recommendations which will preserve the right of fair trial."[24]

We have noted that at the annual Judicial Conference of the Texas judiciary, there was on the agenda for October 6, 1962, the item "Judicial Ethics," which was to deal with whether the Canons of Judicial Ethics should be approved in principle, after considering the adoption of the remaining Judicial Canons as recommended by the American Bar Association. The subjects were on motion tabled. How-

[24] Interim Report and Recommendations, p. 2.

ever, a motion was carried to appoint another committee to consider the adoption of the Canons of Judicial Ethics.

Resolution of the Judicial Conference of the United States. The fact that the substantive provisions of Judicial Canon 35 recently have been reaffirmed by the further implementation of Federal Rule 53 of Criminal Procedure by unanimous Resolution[25] of the members of the Judicial Conference of the United States, presided over by Chief Justice Earl Warren, is further evidence that the judiciary and the bar of the courts of our several states and of the United States, with few exceptions, believe that the substantive provisions of Judicial Canon 35 represent sound policy in judicial administration. The Resolution of the Judicial Conference, while respected and persuasive, has not been deemed controlling by our committee. We therefore have made an independent survey and study on the basis of which our recommendations are made.

Concluding Consensus

No scientific means exist on which to assess the direct effects of photography and broadcasting upon trials, or their indirect effects in influencing public opinion for or against a defendant or litigant in ways which could affect the outcome of trials. Neither is there any evidence that would be the basis for concluding that fair trial would be better served by permitting photography, broadcasting or televising in our courts.

It may well be conceded that under ideal circumstances and with ideal equipment in the hands of competent and discreet technicians near noiseless photography and broadcasting are possible, but we do not believe that noise and confusion are the sole or perhaps even the principal objections. It does not follow that near-silent photography is nearly or entirely harmless. Trial participants are made actors, willingly or not. If they are unwilling actors, then

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[25] *Id.*, p. 97. See also Chief Justice Warren's letter at p. 7 [A-11] of this report.

their dignity as human beings and perhaps their vital legal rights are violated. If willing actors, then they may be even more dangerous because their concern may well be their effectiveness as actors rather than compliance with their oaths.

Since most of our state judges still are elected in political campaigns, in which their success can be affected by the media of public communication, it is unfair to subject them to potentially powerful pressures for a favorable decision as to courtroom privileges, the denial of which may result in open and effective opposition of the disappointed media. We conclude that individual judges should not be empowered to abrogate Canon 35 and infringe the rights of the litigants thereby affected in any particular case. What the decision on Canon 35 should be, when all judges are appointed and enjoy security of tenure and freedom from pressures related to the partisan elective system, is not for this committee to suggest now. The achievement of the ideal of non-political judicial selection would, however, alter the posture of the problem.

The profession of law has the responsibility to maintain and improve the sound administration of justice. We are dedicated to this task. In stating this we do not mean to impugn the profession of journalism practiced through old or new mediums. What we do intend is to state without qualification "every man unto his own." The legal profession has this responsibility; namely, to take a position on this subject based on practical experience and its considered judgment as to the best interests of society.

With the difficulties inherent in a system where men are called upon to judge each other and thereby assume an infinite function, and if we may assume that the bench and bar are dedicated to maintain and improve the administration of justice, we feel justified in suggesting to our friends of the media that perhaps the legal profession is best qualified to determine factors that add or detract from the administration of justice.

Our committee concludes that the safeguards embodied in Judicial Canon 35 are in the best interests of the orderly administration of justice and that the substantive provisions thereof remain valid and should be retained.

Respectfully submitted,

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